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IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A.,

Petitioner,

—v.—

TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF THE CLEARING HOUSE ASSOCIATION, THE NATIONAL FOREIGN TRADE COUNCIL, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Clearing House Association (CHA), the National Foreign Trade Council (NFTC), the Organization for International Investment (OFII), the Securities Industry and Financial Markets Association (SIFMA), and the United States Council for International Business (USCIB) (collectively, amici) respectfully submit this brief amicus curiae in support of the petition of FIA Card Services, N.A., fka MBNA America Bank, N.A. (MBNA), with the consent of all parties.[1]

INTEREST OF THE AMICI CURIAE

The CHA is an association of eleven leading commercial banks, including an affiliate of MBNA.[2] All amici are organizations concerned with the continued vitality of United States international trade and with the competitiveness of U.S. businesses, both at home and abroad. The CHA regularly appears as amicus curiae in cases raising important issues relating to banking, and its members — along with those of all other amici — have a common and vital interest in the consistent and uniform application of the nexus standards for state taxation in this country.

In addition to sharing concerns raised in MBNA's petition related to the inappropriate and potentially multiple imposition of state income or franchise taxes on the same income, amici are concerned that West Virginia's imposition of income and franchise taxes on a bank with no physical presence in West Virginia threatens to damage U.S. foreign economic relations. In particular, amici believe that the decision below is likely to embolden aggressive

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[1] Both parties have consented to the submission of this brief in letters filed with the Clerk.

[2] The members of the Clearing House Association are Bank of America, The Bank of New York, Citibank, N.A., Deutsche Bank Trust Company Americas, HSBC Bank USA, JPMorgan Chase Bank, La Salle Bank, UBS AG, U.S. Bank, Wachovia Bank, and Wells Fargo Bank.

extraterritorial taxation by both states and foreign nations, thus damaging commercial comity between the United States and other nations and endangering U.S. taxing jurisdiction over the overseas commercial activities of its residents and corporations. Amici believe that the question presented in the petition for certiorari in this case requires resolution by this Court to avoid these serious consequences.

SUMMARY OF ARGUMENT

The decision below[3] represents a broad and unwarranted exercise of state taxing jurisdiction and should be reversed because it carries serious implications for U.S. taxing jurisdiction vis-à-vis foreign authorities. The decision imposed on MBNA income and franchise taxes despite MBNA's total absence from the state of West Virginia — not an office, not a branch, not even a mailbox.

The decision below employs a "minimal nexus" standard[4] that is virtually indistinguishable from that developed in this Court's Due Process jurisprudence. Reliance on this standard violates the Commerce Clause of the U.S. Constitution and nearly universally-accepted international norms requiring a physical presence (involving a "permanent establishment") as a predicate for income-based taxation.[5] Indeed, the decision below openly

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[3] *Tax Comm'r of the State of West Virginia* v. *MBNA America Bank, N.A.*, 640 S.E.2d 226 (W. Va. 2006), Petitioner's Appendix ("Pet. App.") at 1a-38a.

[4] *See* 640 S.E.2d at 238, Pet. App. at 32a.

[5] In addition, as the brief for Petitioner points out, such a standard is fundamentally incompatible with important federalism interests bottomed

disregards this Court's Commerce Clause precedents on the surmise that this Court will in turn overrule itself. If states are allowed to tax the income of citizens and corporations of other states or nations based on this nebulous minimal nexus standard, the delicate balance established by numerous international tax treaties will be upset, causing serious disruption to the expectations of international businesses that engage in commerce with the United States.[6]

Moreover, a serious violation of international norms of the sort undertaken by West Virginia here undermines the position that the United States has long embraced in tax treaty negotiations with foreign nations. Permitting such an unwarranted exercise of extraterritorial jurisdiction by one state is likely to invite reciprocal tactics by foreign taxing authorities, seriously compromising the competitive leadership of U.S. businesses. Ultimately, under the foreign tax credit system that has long been a cornerstone of our income tax system, this would have the effect of reducing United States tax revenue while other nations expand their tax jurisdiction over U.S activities that have no physical presence abroad.[7]

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on the Court's longstanding respect for the integrity of the sovereignty of the several States. Petitioner's Brief ("Pet.") at 27-28.

[6] *See Quill Corp.* v. *North Dakota*, 504 U.S. 298, 317 (1992) (noting substantial reliance interest existing in the physical presence rule).

[7] *See* 26 U.S.C. 901(a) (2007); *see also* 26 U.S.C. 164(a)(3).

ARGUMENT

I. Minimal Nexus (as Opposed to Physical Presence) as a Basis for Extraterritorial Taxation Conflicts with International Tax Policy

With "no precedential support whatsoever for [its] conclusions,"[8] the court below permitted the imposition of franchise and income taxes on MBNA based on a minimal nexus standard derived from this Court's personal jurisdiction jurisprudence, consistent with the open acknowledgment that MBNA had no physical presence in West Virginia.[9] Not only does such a minimal nexus standard fly in the face of this Court's Commerce Clause precedents, it is diametrically contrary to the international consensus that is reflected in an intricate network of tax treaties.

A. International Tax Policy is Found in the Extensive Network of Bilateral Tax Treaties Binding Nations Throughout the World

Income tax treaties are bilateral agreements composed of a set of mutual adjustments and concessions between the treasuries of the treaty countries.[10] Although the first income tax treaty was signed at the turn of the 20th century, income tax treaties only proliferated after World War I when the war-torn governments of Europe imposed high income tax

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[8] *See* 640 S.E.2d at 237, Pet. App. 28a (Benjamin, J., dissenting).

[9] *See* 640 S.E.2d at 228, Pet. App. 4a.

[10] *See* Joseph Isenbergh, International Taxation: U.S. Taxation of Foreign Persons and Foreign Income (3d ed. 2004), § 101:1.

rates to finance their war efforts and reconstruction.[11] The treaties were designed to eliminate double taxation by allocating the tax base between countries in an equitable manner and, in doing so, promoting international trade and investment.[12] Physical presence had been the time-tested standard for establishing tax nexus. Consequently, these treaties adopted this standard as their own. With the globalization and integration of the nations' economies, taxation has become an increasingly international endeavor, further underscoring the importance of tax treaties to international trade.[13]

Among the network of treaties that developed, a universal requirement for imposing income taxes on a nonresident is physical presence in the taxing jurisdiction.[14] This physical presence is generally framed as the requirement of a "permanent establishment" (or "PE").[15] Once established, a PE permits the taxing jurisdiction to tax that portion, but only that portion, of the nonresident's income attributable to the PE.[16]

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[11] See Zvi D. Altman, Dispute Resolution Under Tax Treaties 196 (International Bureau of Fiscal Documentation) (2005).

[12] *See* Joel Slemrod, "Free Trade Taxation and Protectionist Taxation," 2 *Int'l Tax & Pub. Fin.* 471, 479; *see also* Peter H. Blessing & Carol Dunahoo, Income Tax Treaties of the United States, § 1.01, Warren, Gorham & Lamont of RIA (2007), *available at* ITTUS WGL 1.01.

[13] *See id.*

[14] *See* Isenbergh at § 103:9; *see, e.g.*, Appendices B and C hereto (citing numerous tax treaties requiring physical presence, including all tax treaties to which the United States is a party).

[15] *See* Isenbergh at § 103:9.

[16] *Id.*

The United States currently is a party to 57 bilateral tax treaties covering 65 countries.[17] Each and every one of these treaties requires a PE before a foreign nation may impose tax on the business income of U.S. residents[18] (and, reciprocally, prevents the United States from imposing a tax on the business income of residents of the treaty counter-parties absent PE in the United States). All of the tax treaties among the G8 nations,[19] India and China — economies that collectively represent over 69% of the worldwide GDP[20] — require a PE.[21] Additionally, the member nations of the Organization for Economic Cooperation and Development

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[17] *See* Treas. Dep't, Office of Public Affairs, Testimony of Patricia A. Brown, Deputy International Tax Counsel (Treaty Affairs), Before the Senate Committee on Foreign Relations on Pending Income Tax Agreements (hereinafter "Brown Testimony"), at 3 (Feb. 2, 2006), *available at* 2006 TNT 23-15 (2006). Because one of these 57 treaties covers multiple countries — in particular, the successor countries to the former U.S.S.R. — there are 65 countries involved.

[18] *See* Appendix B hereto.

[19] As a premier international forum for policy research and discussion, the G8 counts among its member nations Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. *See* Group of Eight (G8), U.S. Dep't of State, *available at* http://usinfo.state.gov/ei/economic_issues/group_of_8.html.

[20] *See* World Development Indicators database, World Bank (Jul. 1, 2006), *available at* http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf.

[21] *See* Appendix C hereto (citing all tax treaties among the G8 Nations, plus India and China, all of which contain a PE requirement).

(OECD)[22] — an organization that regularly serves as the premier international outlet for reform efforts in a number of policy areas, including international taxation[23] — are parties to approximately 350 tax treaties,[24] and recently reaffirmed their commitment to the PE concept by adopting the Ottawa Taxation Framework Conditions.[25] Worldwide, there are over 2500 bilateral tax treaties in force.[26] "With different shadings in different treaties, some form of [the PE] principle is universal."[27]

This universal practice is also prominently incorporated by model tax treaties that embody international norms. Like all the prior U.S. model treaties, the current U.S. Model Treaty, released in November 2006 and used by the United States as the basis for its treaty negotiations, includes the

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[22] The OECD is a Paris-based organization composed of 30 industrialized countries — representing a significant majority of the world economy — "sharing a commitment to democratic government and the market economy" through such efforts as production of "internationally agreed instruments, decisions and recommendations . . . necessary for individual countries to make progress in a globalised economy." About OECD, *available at* http://www.oecd.org/about/.

[23] *See* Arthur J. Cockfield, *The Rise of OECD as Informal 'World Tax Organization' Through the Shaping of National Responses to E-Commerce Tax Challenges*, 8 Yale J.L. & Tech. 136 (2006).

[24] OECD, About Tax Treaties, *at* http://www.oecd.org/about/0,2337,en_2649_33747_1_1_1_1_37427,00.html.

[25] *See* OECD Committee on Fiscal Affairs, Electronic Commerce: Taxation Framework Conditions (1998).

[26] *See* Eduardo Baistrocchi, *The Transfer Pricing Problem: A Global Proposal for Simplification*, 59 Tax Law 941 (2006).

[27] Isenbergh at § 103:1.

standard PE rule.[28] The OECD and the United Nations have similarly developed model treaties for purposes of assisting nations in negotiating tax treaties.[29] Both of these contain the ubiquitous PE rule.

As explained in recent testimony before the U.S. Senate, an OECD working group recently concluded (over objections voiced by a few countries, addressed below) that the consistent inclusion of the PE requirement in the world's intricate web of tax treaties serves the important goals of economic predictability and uniformity in international trade, mitigating double taxation and preventing tax jurisdictional disputes while reducing considerable administrative burdens.[30] Just last month, the OECD made further efforts to

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[28] United States Model Income Tax Convention of November 15, 2006 (hereinafter "U.S. Model Treaty"), at ¶ 209.05. The PE rule in the U.S. model treaty limits taxation to situations where there is a PE as follows:

> The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as are attributable to that permanent establishment.

Id. at ¶ 209.07(1).

[29] *See* OECD Committee on Fiscal Affairs, Model Tax Convention on Income and on Capital, Article 5 (Paris, OECD 2005); United Nations Model Double Taxation Convention Between Developed and Developing Countries, Article 5 (2001).

[30] Michael F. Mundaca, *How Much Should Borders Matter?: Tax Jurisdiction in the New Economy*, Testimony of Michael F. Mundaca, Principal at Ernst & Young, Before the Senate Committee on Finance, Subcommittee on International Trade, at 7 (July 25, 2006), *available at*

clarify the definition of "permanent establishment" in the model treaty, demonstrating the OECD's continued commitment to the PE requirement.[31] As a member of the Treasury Department has testified to a committee of the U.S. Senate, "[t]he success of this framework is evidenced by the fact that the millions of cross-border transactions that take place around the world each year give rise to relatively few disputes regarding the allocation of tax revenues between governments."[32] That success is threatened by any disruption of the world's delicate, multilateral balance for tax nexus norms.

B. Permanent Establishment Exists Only Where There is Physical Presence

All treaties including a PE requirement define it as a "fixed place of business" which requires a *physical* presence. Most treaties, including the U.S. Model Treaty, define PE as follows:

> 1. . . . the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly

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www.senate.gov/~finance/hearings/testimony/2005test/072506mmtest.pdf (discussing OECD working group report).

[31] *See* Mitchell J. Tropin, *OECD Seeks Comment on Revised Proposal on When Providing Services Establishes PE*, BNA Daily Tax Report (Mar. 13, 2007), *available at* http://pubs.bna.com/ip/bna/dtr.nsf/eh/a0b4d3z1g6.

[32] Testimony of Barbara Angus, International Tax Counsel, United States Department of the Treasury, Before the Senate Committee on Foreign Relations on Pending Income Tax Agreements, at 1 (March 5, 2003), *available at* 2003 TNT 45-19.

carried on.

2. The term "permanent establishment" includes especially:

a) a place of management;
b) a branch;
c) an office;
d) a factory;
e) a workshop; and
f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.[33]

This provision protects U.S. companies with customers — but no physical presence — abroad from overseas taxation. Reciprocally, this provision and the corresponding portions of the U.S. Internal Revenue Code protect a foreign company from taxation in the United States absent a physical presence in this country.

Despite slight variations in the definition of PE from treaty to treaty, one constant is the requirement of *physical* connection between the taxing jurisdiction and the taxpayer,[34] thus giving rise to the requirement of a "fixed place of business."[35] In fact, the Technical Specifications to the U.S. Model Treaty explicitly adopt OECD Commentary[36] — thus giving effect to a broad international consensus — in

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[33] U.S. Model Treaty at ¶ 209.05.
[34] Isenbergh at § 103:11.
[35] U.S. Model Treaty at ¶ 209.05.
[36] OECD Commentary to Article 5, ¶¶ 4-8.

stating that "a general principle . . . in determining whether a permanent establishment exists is that the place of business must be 'fixed' in the sense that a particular building or physical location is used by the enterprise for the conduct of its business . . . ."[37]

Not only is physical presence the universally-accepted standard for defining tax nexus, it is also the law of this nation under the Commerce Clause of the U.S. Constitution. As discussed in the petition for certiorari in this case,[38] this Court expressly endorsed the rule requiring physical presence in *National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*,[39] and affirmed its continuing vitality twenty-five years later in *Quill Corp. v. North Dakota*.[40] Indeed, *Quill* itself summarized this Court's prior cases upholding state taxation as all "involv[ing] taxpayers who had a *physical presence* in the taxing State."[41] The concerns and interests that undergird the physical presence standard in this Court's Commerce Clause jurisprudence — the need to foster "settled expectations"[42] and to rescue taxpayers from the "welter of complicated obligations"[43] — are also the same

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[37] Technical Specifications to U.S. Model Convention of Nov. 15, 2006, Art. 5 ¶ 1.
[38] *See* Pet. at 2.
[39] 386 U.S. 753 (1967).
[40] 504 U.S. 298 (1992).
[41] 504 U.S. at 314; *see also* Pet. at 22.
[42] *Quill*, 504 U.S. at 314-16.
[43] *Bellas Hess*, 386 U.S. at 759-60.

concerns and interests that led to its adoption as the norm in the international community.[44]

C. The Lower Court's Departure from a Settled Norm of Physical Presence Will Encourage Aggressive Extraterritorial Tax Measures

The decision below imposed on MBNA direct taxes despite MBNA's admitted physical absence from that state. If the decision below stands, other U.S. states will be emboldened to extend their already-aggressive efforts to impose extraterritorial taxes.

West Virginia is by no means the only state to impose taxes of the sort at issue in this case. Other examples abound, at least ten of which are discussed in the petition for certiorari in this case.[45] Additionally, New Jersey has recently circulated "nexus surveys" to foreign affiliates of domestic companies,[46] suggesting that New Jersey intends to apply *outside* the United States the New Jersey Supreme

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[44] *See, e.g.*, OECD Technical Advisory Group, Are the Current Rules for Taxing Business Profits Appropriate for E-Commerce?, Paris (June 2004); Isenbergh at § 103:2.

[45] *See* Pet. at 17-18. Further examples include the Ohio Commercial Activity Tax ("CAT"), *see* Ohio Rev. Code Ann. § 5751.02 (2006), and the New Jersey Corporation Business Tax ("CBT"), *see* N.J. Stat. Ann. § 54:10A. Other states, including New Mexico, North Carolina, and Oklahoma, have acted similarly. *See, e.g., Kmart Props., Inc.* v. *Taxation and Revenue Dep't*, 131 P.3d 27 (N.M. App. 2001); *A&F Trademark Inc.* v. *Tolson*, 605 S.E.2d 187 (N.C. App. 2004), *cert. denied*, 126 S. Ct. 353 (2005); *Geoffrey Inc. v. Oklahoma Tax Comm'n*, 132 P.2d 632 (Okla. Civ. App. 2005).

[46] *See, e.g.*, Redacted Nexus Survey, July 17, 2006, *available at* http://www.ofii.org/njltr.pdf.

Court's recent ruling in *Lanco, Inc.* v. *Dir., Div. of Taxation*.[47] In *Lanco*, the New Jersey Supreme Court distinguished the physical presence test of *Quill*[48] as only applicable to sales and use taxes, and not applicable to the income taxes at issue in *Lanco*.[49] But whereas the *Lanco* Court faced the issue of taxing domestic companies with no physical presence in New Jersey, New Jersey's recent "nexus surveys" suggest a dangerous extrapolation of the *Lanco* principle internationally.

Nor is such aggressive tax policy limited to the domestic arena. Spain and Portugal have formally registered exceptions to OECD commentary interpreting PE under Article 5 of the OECD Model Treaty to require a physical presence.[50] A report prepared by Indian tax authorities in 2001 agitated for the abandonment of the traditional PE concept.[51] Additionally, the Kuwaiti Minister of Finance has recently re-interpreted the Kuwaiti tax law to enable the Kuwaiti Department of Income Tax to collect taxes from multinational companies that have no PE in Kuwait.[52] The

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[47] 908 A.2d 176 (N.J. 2006) (affirming 879 A.2d 1234 (N.J. Super. Ct. App. Div. 2005)).

[48] 504 U.S. 298 (1992).

[49] 908 A.2d 176.

[50] *See* OECD Committee on Fiscal Affairs, *Clarification on the Application of the Permanent Establishment Definition in E-commerce: Changes to the Commentary on the Model Tax Convention on Article 5*, Paris, 22 December 2000.

[51] *See* Ministry of Finance (India), Report of the High Powered Committee on E-Commerce and Taxation 11-12 (2001).

[52] *See* Daniel W. Christman, Lt. General (Ret.), Senior Vice President for International Affairs, U.S. Chamber of Commerce, Letter to Sheikh

U.S. government opposes these departures from the PE principle.[53]

Absent much-needed intervention by this Court, amici believe that West Virginia — and other U.S. states — will begin taxing *foreign* corporations that merely have customers in that state. Indeed, nothing in the existing West Virginia tax law here at issue — which is imposed on "foreign corporations" that are defined as corporations not "organized under the laws of West Virginia"[54] — precludes West Virginia from doing exactly that. Even more alarmingly, foreign nations will seek to tax the income of U.S. residents and corporations, even though such residents and corporations have no physical presence overseas.

II. The Decision Below Has Serious Implications for U.S. Participation in International Trade

If those engaged in international commerce cease to be able to rely on physical presence as the baseline for direct taxation, the United States likely will suffer a reduction in inbound investment and trade. In addition, because the decision below will invite foreign nations to impose tax on the business income of U.S. residents and corporations that

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Nasser Al-Mohammad Al-Ahmad Al-Sabah, Prime Minister of the State of Kuwait (Feb. 10, 2006) (on file with the U.S. Chamber of Commerce) ("The Chamber is concerned that the Kuwait DIT is misapplying the Kuwait Income Tax Decree, as amended and annexed in 1957, which clearly states that foreign companies are subject to taxation only if they have physical presence in the country or are represented by an 'agent.'").

[53] *See* U.S. Model Treaty at ¶ 209.05 (requiring PE).

[54] W. Va. Corporation Net Income Tax, W. Va. Code §§ 11-24-3a(6); W. Va. Business Franchise Tax, W. Va. Code §§ 11-23-3(b)(9).

have not even a mailbox abroad, it will cause serious damage to the competitive leadership of U.S. businesses, not to mention a dangerous encroachment on the national fisc.

A. The U.S. Will Suffer A Decline in Foreign Investment

The continuing ambiguity of tax jurisdiction standards in the United States, combined with the aggressive behavior of state tax administrators, will have a deterrent effect on foreign trade in the United States. If foreign companies are faced with large and unascertainable tax liability in the United States, they will choose instead to invest in trade with countries where bright-line jurisdictional tests are understood and followed by taxpayers and tax administrators alike.

B. U.S. Companies Will Suffer Retaliation by Other Countries

U.S. companies operating abroad will likely suffer a destructive cycle of retaliation at the hands of foreign tax regimes. As discussed *supra* in Part I.C, a few countries have already sought to expand the extra-territorial reach of their tax laws through adoption of nexus standards similar to the minimal nexus standard advocated by West Virginia. U.S. businesses, which are leaders in e-commerce and international trade, naturally have the most to lose if foreign governments were to tax them on their income despite physical absence from the taxing state.

Moreover, U.S. businesses will suffer the result of losing more *in* the United States than comparable foreigners operating here. This is so because U.S. states that impose

taxes like those here at issue are imposing them earlier and more consistently on domestic companies than on foreign companies, leaving the domestic companies at a competitive disadvantage of effectively paying higher taxes than similarly-situated foreign businesses with customers in the United States. Additionally, U.S. states uniformly decline to provide tax credits for foreign taxes paid,[55] thus exposing U.S. companies to the dual pincers of extraterritorial taxation by U.S. states *and* the resultant, retaliatory, extraterritorial taxation by foreign nations.

Even more seriously, retaliatory extraterritorial taxation by foreign governments will reduce tax revenues to the United States Treasury. Since 1918,[56] the Internal Revenue Code has included a foreign tax credit system under which U.S. taxpayers are granted a credit against their U.S. taxes for income taxes they have paid to foreign taxing authorities.[57] An aggressive expansion of taxing jurisdiction by other nations, coupled with credits for such taxes that offset U.S. taxpayers' *domestic* tax liability, will have the

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[55] *See* Jerome R. Hellerstein & Walter Hellerstein, State Taxation, § 7.10[3] (3d ed. 2007) ("No state allows a foreign tax credit for corporate taxpayers . . .").

[56] *See* Revenue Act of 1918, ch. 18, Pub. L. No. 65-254, §222(a), 40 Stat. 1057. The Internal Revenue Code has allowed a deduction for foreign taxes paid since 1913. *See* Underwood Tariff Act, Pub. L. No. 63-16, ch. 16, §II(G)(b), 38 Stat. 114.

[57] *See* 26 U.S.C. § 901(a) (2007).

effect of significantly reducing United States tax revenue.[58] The result will be a grave detriment to the national fisc.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[58] The creditability of foreign taxes is subject to certain limitations under Section 904(a) of the Code, such as the requirement that the taxpayer have sufficient foreign-sourced income related to such foreign taxes. In general, these limitations do not prevent offsetting of a taxpayer's U.S. tax liability with foreign taxes, because income generated from customers abroad may well qualify as foreign source income. *See, e.g.*, 26 U.S.C. § 862(a)(6) (2007); 26 C.F.R. § 1.861-7(c) (2007) (stating the general rule that income from sales of inventory is foreign-sourced if title passes in a foreign country). In any event, even without the tax credit system, U.S. taxpayers will be able to deduct such foreign taxes as a cost of doing business, *see* 26 U.S.C. § 164(a)(3) (2007), again reducing the take of the national treasury. Of course, if Congress were to take away both the credit and deduction, U.S. businesses would suffer the injustice of double taxation: hardly a recipe for maintaining commercial leadership.

APPENDIX

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APPENDIX A
DESCRIPTIONS OF AMICI CURIAE

- The Clearing House was founded over 150 years ago and is an association of leading commercial banks in the United States that provides payment, clearing and settlement services to its member banks and to other financial institutions. The Clearing House regularly appears as amicus curiae in cases that present issues of national importance to the commercial banking industry.

- The National Foreign Trade Council ("NFTC"), founded in 1914, is the oldest U.S. business association dedicated to international tax, trade, and human resource matters. The NFTC's approximately 300 members, representing the largest U.S. companies, are active advocates of free trade and a rules-based economy. The NFTC's emphasis is to encourage policies that will expand U.S. exports and enhance the competitiveness of U.S. companies by eliminating major tax inequities in the treatment of U.S. companies operating abroad.

- The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies. OFII's member companies employ hundreds of thousands

of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

- The Securities Industry and Financial Markets Association ("SIFMA") was recently born of the merger between The Securities Industry Association and The Bond Market Association. SIFMA serves as a voice for strengthening markets and supporting investors the world over. It is dedicated to representing more than 650 member firms of all sizes in financial markets in the U.S. and around the world.

- The United States Council for International Business ("USCIB") represents over 300 U.S.-based multinational companies, professional firms, and business associations, seeking to advance the global interests of U.S. business at home and abroad. It promotes an open system of global commerce in which business can flourish and contribute to economic growth, human welfare and protection of the environment. USCIB is the U.S. affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee to the OECD (BIAC) and the International Organization of Employers (IOE).

APPENDIX B
ALL TAX TREATIES TO WHICH THE UNITED STATES IS A PARTY, ALL CONTAINING A PERMANENT ESTABLISHMENT CLAUSE

Convention Between the Government of the United States of America and the Government of Australia for the Avoidance of Double Taxation, Article 5, Oct. 31, 1983; Convention Between the Republic of Austria and the United States of America for the Avoidance of Double Taxation, Article 5, Feb. 1, 1998; Convention Between the Government of the United States of America and the Government of the People's Republic of Bangladesh for the Avoidance of Double Taxation, Article 5, Aug. 7, 2006; Convention Between Barbados and the United States of America for the Avoidance of Double Taxation, Article 5, Feb. 28, 1986; Convention Between the United States of America and the Kingdom of Belgium for the Avoidance of Double Taxation, Article 5, Oct. 13, 1972; Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Article 5, Aug. 16, 1984; Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Oct. 22, 1986; Convention Between the Government of the United States of America and the Government of the Republic of Cyprus for the Avoidance of Double Taxation, Article 5, Dec. 31, 1985; Convention Between the United States of America and the Czech Republic for the Avoidance of Double Taxation, Article 5, Dec. 23, 1993; Convention Between the

Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation, Article 5, Mar. 31, 2000; Convention Between the Government of the United States of America and the Government of the Arab Republic of Egypt for the Avoidance of Double Taxation, Article 5, Dec. 31, 1981; Convention Between the United States of America and the Republic of Estonia for the Avoidance of Double Taxation, Article 5, Dec. 30, 1999; Convention Between the Government of the United States of America and the Government of the Republic of Finland for the Avoidance of Double Taxation, Article 5, Dec. 30, 1990; Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation, Article 5, Dec. 30, 1995; Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation, Article 5, Aug. 21, 1991; Convention Between the United States of America and the Kingdom of Greece for the Avoidance of Double Taxation, Article III, Dec. 30, 1953; Convention Between the Government of the United States of America and the Government of the Hungarian People's Republic for the Avoidance of Double Taxation, Article 5, Sept. 18, 1979; Convention Between the United States of America and the Republic of Iceland for the Avoidance of Double Taxation, Article 9, Dec. 26, 1975; Convention Between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Dec. 18, 1990;

Convention Between the Government of the United States and the Government of the Republic of Indonesia for the Avoidance of Double Taxation, Article 5, Dec. 30, 1990; Convention Between the Government of the United States of America and the Government of Ireland for the Avoidance of Double Taxation, Article 5, Dec. 17, 1997; Convention Between the Government of the United States of America and the Government of Israel with Respect to Taxes on Income, Article 5, Dec. 30, 1994; Convention Between the Government of the United States of America and the Government of the Republic of Italy for the Avoidance of Double Taxation, Dec. 30, 1985; Convention Between the Government of the United States of America and the Government of Jamaica for the Avoidance of Double Taxation, Article 5, Dec. 29, 1981; Convention Between the Government of the United States and the Government of Japan for the Avoidance of Double Taxation, Mar. 30, 2004; Convention Between the Government of the Republic of Kazakhstan and the Government of the United States of America for the Avoidance of Double Taxation, Article 5, Dec. 30, 1996; Convention Between the United States of America and the Republic of Korea for the Avoidance of Double Taxation, Article 9, Sept. 20, 1979; Convention Between the United States of America and the Republic of Latvia for the Avoidance of Double Taxation, Article 5, Dec. 30, 1999; Convention Between the Government of the United States of America and the Government of the Republic of Lithuania for the Avoidance of Double Taxation, Article 5, Dec. 30, 1999; Convention Between the

Government of the Grand Duchy of Luxembourg and the Government of the United States of America for the Avoidance of Double Taxation, Article 5, Dec. 20, 2000; Agreement Between the United States of America and the Republic of Malta with Respect to Taxes on Income, Article 5, Jan. 1, 1997; Convention Between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation, Article 5, Dec. 28, 1993; Convention Between the Government of the United States of America and the Government of the Kingdom of Morocco for the Avoidance of Double Taxation, Article 4, Dec. 30, 1981; Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation, Article 5, Dec. 31, 1993; Convention Between the United States of America and New Zealand for the Avoidance of Double Taxation, Article 5, Nov. 2, 1983; Convention Between the United States of America and the Kingdom of Norway for the Avoidance of Double Taxation, Article 4, Nov. 29, 1972; Convention Between the Government of the United States of America and the Government of Pakistan for the Avoidance of Double Taxation, Article III, May 21, 1959; Convention Between the Government of the United States of America and the Government of the Republic of the Philippines with Respect to Taxes on Income, Article 5, Oct. 16, 1982; Convention Between the Government of the United States of America and the Government of the Polish People's Republic for the Avoidance of Double Taxation, Article 6, July 22, 1976; Convention Between the United

States of America and the Portuguese Republic for the Avoidance of Double Taxation, Article 5, Dec. 18, 1995; Convention Between the United States of America and the Socialist Republic of Romania for the Avoidance of Double Taxation of Income, Article 5, Feb. 26, 1976; Convention Between the United States of America and the Russian Federation for the Avoidance of Double Taxation, Article 5, Dec. 16, 1993; Convention Between the United States of America and the Slovak Republic for the Avoidance of Double Taxation, Article 5, Dec. 30, 1993; Convention Between the United States of America and the Republic of Slovenia for the Avoidance of Double Taxation, Article 5, June 22, 2001; Convention Between the Republic of South Africa and the United States of America for the Avoidance of Double Taxation, Article 5, Dec. 28, 1997; Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation, Article 5, Nov. 21, 1990; Convention Between the Government of the United States and the Government of the Democratic Socialist Republic of Sri Lanka for the Avoidance of Double Taxation, Article 5, July 12, 2004; Convention Between the Government of Sweden and the Government of the United States of America for the Avoidance of Double Taxation, Article 5, Oct. 26, 1995; Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation, Article 5, Dec. 19, 1997; Convention Between the Government of the United States of America and the Government of the Kingdom of Thailand for the Avoidance of Double Taxation, Article 5, Dec. 15,

1997; Convention Between the Government of the United States of America and the Government of Trinidad and Tobago for the Avoidance of Double Taxation, Article 9, Dec. 30, 1970; Convention Between the Government of the United States of America and the Government of the Tunisian Republic for the Avoidance of Double Taxation, Article 5, Dec. 26, 1990; Agreement Between the Government of the Republic of Turkey and the Government of the United States of America for the Avoidance of Double Taxation, Article 5, Dec. 19, 1997; Convention Between the United States of America and the Union of Soviet Socialist Republics for the Avoidance of Double Taxation of Income, Article 4 Jan. 29, 1976; Convention Between the Government of the United States of America and the Government of Ukraine for the Avoidance of Double Taxation, Article 5, June 5, 2000; Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation, Article 5, Mar. 31, 2003; Convention Between the Government of the United States of America and the Government of the Republic of Venezuela for the Avoidance of Double Taxation, Article 5, Dec. 30, 1999.

APPENDIX C
TAX TREATIES AMONG THE G8 NATIONS AND CHINA AND INDIA, ALL CONTAINING A PERMANENT ESTABLISHMENT CLAUSE

1990 EU Arbitration Convention, Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, Section II, Jan. 1, 1995; Agreement Between the Government of Canada and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Dec. 29, 1986; Convention Between Canada and France for the Avoidance of Double Taxation, Article V, July 29, 1976; Agreement Between Canada and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, Mar. 28, 2002; Agreement Between the Government of Canada and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, May 6, 1997; Agreement Between the Government of Canada and the Government of the Russian Federation for the Avoidance of Double Taxation, Article 5, May 5, 1997; Agreement Between the Government of the People's Republic of China and the Government of the Republic of Italy for the Avoidance of Double Taxation, Article 5, Dec. 13, 1990; Agreement Between the Government of the People's Republic of China and the Government of the Russian Federation for the Avoidance of Double Taxation, Article 5, Apr. 10, 1997; Agreement Between the Government of The French

Republic and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Feb. 21, 1985; Convention Between the Government of the Republic of France and the Government of Japan for the Avoidance of Double Taxation, Article 5, Mar. 24, 1996; Convention Between the Government of the French Republic and the Government of the Russian Federation for the Avoidance of Double Taxation, Article 5, Feb. 9, 1999; Elimination of Double Taxation and Establishment of Rules of Reciprocal Administrative Assistance in Fiscal Matters Between France and the SARR, Article 7, Dec. 31, 1956; Convention Between the Federal Republic of Germany and the People's Republic of China for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Article 5, January 1, 1985; Convention Between the Federal Republic of Germany and the French Republic for the Avoidance of Double Taxation, Article 4, July 21, 1959; Agreement Between the Federal Republic of Germany and the Republic of India for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Article 5, Oct. 2, 1996; Convention Between the Federal Republic of Germany and the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Article 5, Dec. 24, 1992; Agreement Between the Federal Republic of Germany and the Russian Federation for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Article 5, Dec. 30, 1996; Agreement Between the Government of the Republic of India and the Government of the People's Republic of China for the

Avoidance of Double Taxation, Article 5, Nov. 21, 1994; Convention Between the Government of the Republic of India and the Government of the French Republic for the Avoidance of Double Taxation, Article 5, Aug. 1, 1994; Agreement Between the Government of the Republic of India and the Government of the Russian Federation for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, Apr. 11, 1998; Convention Between Italy and Canada for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, Dec. 24, 1980; Convention Between the Government of the Republic of Italy and the government of the Republic of France for the Avoidance of Double Taxation with Respect to the Taxes on Income and On Capital, Article 5, May 1, 1992; Convention Between the Government of the Republic of Italy and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Nov. 23, 1995; Convention Between the Government of the Italian Republic and the Government of the Russian Federation for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, Article 5, Nov. 30, 1998; Convention Between the Government of Japan and the Government of Canada for the Avoidance of Double Taxation, Article 5, Nov. 14, 1987; Agreement Between the Government of Japan and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, June 26, 1984; Agreement Between Japan and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and to Certain Other Taxes,

Article 5, June 9, 1967; Convention Between the Government of Japan and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Dec. 29, 1989; Convention Between Japan and the Republic of Italy for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, March 20, 1969; Convention Between the Government of Japan and the Government of the Union of Soviet Socialist Republics for the Avoidance of Double Taxation with Respect to Taxes on Income, Article 5, Nov. 27, 1986; Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada for the Avoidance of Double Taxation, Article 5, Dec. 17, 1980; Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China for the Reciprocal Avoidance of Double Taxation, Article 5, July 26, 1984; Convention Between the United Kingdom of Great Britain and Northern Ireland and France for the Avoidance of Double Taxation, Article 4, Oct. 27, 1969; Convention Between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for the Avoidance of Double Taxation, Article III, Jan. 30, 1967; Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Oct. 25, 1993; Convention Between the Government of the United Kingdom of Great Britain and the Northern Ireland and the Government of the Italian Republic for the Avoidance of Double Taxation,

Article 5, Dec. 31, 1990; Convention Between the United Kingdom of Great Britain and Northern Ireland and Japan for the Avoidance of Double Taxation, Article 6, February 10, 1969; Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Russian Federation for the Avoidance of Double Taxation, Article 5, Apr. 18, 1997; Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Article 5, Aug. 16, 1984; Agreement Between the Covernment of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation, Article 5, Oct. 22, 1986; Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation, Article 5, Dec. 30, 1995; Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation, Article 5, Aug. 21, 1991; Convention Between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation, Article 5, Dec. 18, 1990; Convention Between the Government of the United States of America and the Government of the Republic of Italy for the Avoidance of Double Taxation, Dec. 30, 1985; Convention Between the Government of the United States and the Government of Japan for the Avoidance of Double Taxation, Mar. 30, 2004; Convention Between the United States of America and the Russian Federation for the Avoidance of

Double Taxation, Article 5, Dec. 16, 1993; Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation, Article 5, Mar. 31, 2003.